GERMAX SDN BHD

v.

MENTERI SUMBER MANUSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING MOTION NO: R2-25-83-2000]
17 MAY 2001

LABOUR LAW: *Industrial Court - Reference by minister - Whether act of reference occurs when notification is issued to Industrial Court - When certiorari may lie against decision - Whether there was manifest injustice - Industrial Relations Act 1967, s. 20(3)*

The first respondent raised an objection to the application for leave to quash the minister's reference on the ground that the decision of the minister on the reference had been made on 10 July 2000 and not on 27 July 2000 as per the letter from the Director General of Industrial Relations. The decision of the minister which was being challenged was to refer the representation of the third respondent to the Industrial Court under s. 20(3) of the Industrial Relations Act 1967 ('the Act'). The first respondent's submission was in effect that the date of the decision of the minister should be a date before he has completed his decision-making process under s. 20(3) of the Act.

Held:

[1] The document allegedly signed on 10 July 2000 merely formed part of the minister's decision-making process. The act of reference by the minister under s. 20(3) of the Act occurs when the notification is issued to the Industrial Court. The minister's decision on whether to refer the representation is a process and it is at the conclusion of this process that *certiorari* may lie against his decision. Manifest injustice and uncertainty will result if the decision is taken to have been made prior to the notification being issued to the Industrial Court.
(pp 468 h & 471 a-b)

[1st respondent's preliminary objection dismissed with costs.]

Case(s) referred to:
Kathiravelu Ganeson v. Kojasa Holdings Bhd [1997] 3 CLJ 777 ***(refd)***
Mersing Omnibus Co Sdn Bhd v. Minister of Labour and Manpower & Anor [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 ***(dist)***
Michael Lee Fook Wah v. Minister of Human Resources Malaysia [1998] 1 CLJ 227 ***(refd)***
Minister of Labour v. Sanjiv Oberoi [1990] 1 MLJ 112 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, ss. 9(5), 20(3), 30(3)
Industrial Relations Regulations 1980, reg. 5
Rules of the High Court 1980, O. 53 r. 1A

For the applicant - Siva Kumar Kanagasabai; M/s Skrine
For the 1st respondent - Narimah Moris, Jabatan Peguam Negara Malaysia

Reported by Suhainah Wahiduddin

JUDGMENT

Faiza Tamby Chik J:
The first respondent has raised an objection to the application for leave to quash the minister's reference on the ground that apparently the decision of the minister on the reference had been made on 10 July 2000 and not on 27 July 2000 as per the letter from the Director of Industrial Relations. The decisions of the Honourable Minister which is being challenged is to refer the representation of the 3rd respondent to the Industrial Court under s. 20(3) of the Industrial Relations Act 1967. Section 20(3) states as follows:

> Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer representations to the Court for an award.

In effect, under s. 20(3), the Honourable Minister is given the discretion to decide on whether or not to refer the representation to the Industrial Court. It is submitted that the minister only exercises his discretion and decides under s. 20(3) when he issues a notification to the Industrial Court referring the representation. I am of the view that until the notification is issued (as opposed to 'communicated') the minister will not have completed his decision making process under s. 20(3). In this case the notification to the Industrial Court is made in a letter dated 27 July 2000 (exh. CSL16 of encl. 2). In *Kathiravelu Ganeson v. Kojasa Holdings Bhd* [1997] 3 CLJ 777 the Court of Appeal observed that the act of the Minister in making the reference (as opposed to 'that act of the minister in recording his decision to refer on piece of paper') has jurisdictional consequences which may be questioned in a judicial review. At p. 790 it is stated as follows:

> Third the referral level. When the Minister receives notification from the Director General that the dispute cannot be settled, he must decide whether to refer it to the Industrial Court. He is not to refer all disputes to the Industrial Court ...
>
> But the act of the Minister making the reference has, as will be seen in a moment, jurisdictional consequences. The decision to refer or not to refer a dispute is therefore a separate and distinct act that may be questioned in judicial proceedings.

Further judicial precedents show that it is always the act of reference under s. 20(3) as contained in a letter issued to the parties to notify them of the decision rather than an internal document recording the decision of the minister which is properly challenged. This can be seen from the following examples:

(a) In the Supreme Court case of *Minister of Labour v. Sanjiv Oberoi* [1990] 1 MLJ 112 at 113 Abdul Hamid LP observed as follows:

> The Minister of Labour considered the report of the Director General and in the exercise of his discretion under s. 20(3) of the Act he did not seem it fit to refer the representations to the Industrial Court. Sanjiv Oberoi was informed accordingly by letter dated 25 November 1986.
>
> Sanjiv Oberoi then obtained leave to apply for an order of *certiorari* to have the decision of the Minister dated 25 November 1986 quashed on grounds that the Minister of Labour, in making his decision under s. 20(3) of the Act, acted in excess or without jurisdiction or abuse of his discretion in that he made the said decision without any lawful, valid or reasonable grounds.

(b) In the Court of Appeal case of *Michael Lee Fook Wah v. Minister of Human Resources Malaysia* [1998] 1 CLJ 227, Shaik Daud JCA stated as follows at p. 230:

> The appellant by an *ex parte* originating motion dated 2 April 1994, applied for an order of *certiorari* to remove into the High Court for the purposes of being quashed, the decision of the first respondent dated 23 February 1994 and for an order of *mandamus* directing the first respondent to exercise his discretion according to law pursuant to s. 20(3) of the Industrial Relations Act 1967 ('the Act').

Later at p. 231, the Court of Appeal made it clear that the decision being challenged was the letter informing the applicant of the decision when it stated as follows:

> Then by a letter dated 23 February 1993, the appellant was informed that the first respondent having considered the representation, decided under s. 20(3) of the Act that the appellant's complaint was not fit to be referred to the Industrial Court.

Therefore I am of the view that the document allegedly signed on 10 July 2000 merely formed part of the minister's decision making process. The decision-making is only complete upon the notification of the reference being issued to the Industrial Court. It is only once the decision-making process is completed that a challenge may be made against the decision of the Minister by way of judicial review.

Further support can be found from O. 53 r. 1A of the Rules of the High Court, 1980. It states that the time for filing an application for leave to apply for *certiorari* is "within six weeks after the date of the proceeding" It therefore recognises that decision-making is a process. On the facts before this court, exh. CSL16 dated 27 July 2000 is the document referring the representations to the Industrial Court for adjudication which completes the decision-making process of the Minister. I think that the proper date is not the point when the minister records his decision on an internal document (which in this case is dated 10 July 2000) as that does not complete the act of reference required by s. 20(3). An act of reference is only committed once the decision is notified to the Industrial Court. Further s. 30(3) of the Industrial Relations Act 1967 requires the Industrial Court to make its award within 30 days of the reference to it under s. 20(3) where practicable. How will this ever be practicable if the date of reference is not taken as being the date of issuance of a letter notifying it that a representation has been referred to it?

In support of the first respondent's objections, the case of *Mersing Omnibus Co Sdn Bhd v. Minister of Labour and Manpower & Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 has been cited. My opinion is that the *Mersing Omnibus* case can be distinguished on the grounds set out below. The *Mersing Omnibus* case dealt with a decision of the Minister under s. 9(5) of the Industrial Relations Act 1967 and the date of the decision was taken as the date of issuance of Form D. Section 9(5) of the Industrial Relations Act 1967 deals with a decision of the minister on recognition of a trade union. According to reg. 5 of the Industrial Relations Regulations 1980, the decision of the minister must be embodied in Form D. A perusal of Form D will show the following:

(i) It is addressed to the relevant parties;

(ii) It must be executed by the Minister and it must set out the decision of the Minister on the claim for recognition.

However, in respect of a decision under s. 20(3), there is no such prescribed form. The decision to refer is only made when the reference is made to the Industrial Court. The reference is made in the letter dated 27 July 2000 when notification is issued to the Industrial Court and not before that. The document allegedly signed by the Minister on 10 July 2000 is not addressed nor is it expressed to be issued to anybody. The court in the *Mersing Omnibus* case did not state that the proper date of the decision of the Minister is when he signed an internal document. The Federal Court held that it was only upon the minister completing the execution of Form D (as required by law) which is then issued to the relevant parties (see Form D) that his decision making-process was complete. At p. 9 (at p. 269) the Federal Court stated as follows:

> The decision of the Minister in the instant appeal is embodied in Form D prescribed in the Industrial Relations Regulations, 1980 which records his decision made 'hereby' and was typed and signed by him and dated November 23, 1981. The process of decision-making by the Minister was then complete and his decision was accordingly given on that date - November 23, 1981.

In the case before this court, the 1st respondent's submission is in effect that the date of the decision of the Minister should be a date before he has completed his decision-making process under s. 20(3). This is because on 10 July 2000, the minister had not committed an act of reference under s. 20(3). He merely recorded his decision on a piece of paper.

The Federal Court in *Mersing Omnibus* was concerned with achieving certainty with regards to the date of the decision of the minister and I think this cannot be achieved by treating an internal document allegedly recording the decision of the minister as the proper date. It is evident that the *Mersing Omnibus* case was concerned about achieving certainty in determining the time for applying for *certiorari*. At p. 9 (at p. 268) the Federal Court stated as follows in rejecting the date of communication:

> In this event, it would be virtually impractical and well-high impossible to ascertain a settled and agreed date of communication of a decision as this would vary from party to party according to when it received notification of the decision.

It is observed that there will be great uncertainty if the court attempts to ascertain the time of the decision as a point during the decision-making process. The date of the minister could then be when he signed the document with the date 10 July 2000. It could also be on a date when he signed another document noting his decision (since there is no prescribed form) or when he verbally communicated his decision to the director-general or even his secretary. It could even be at the time he makes a decision in his mind but does not inform anybody about it. This surely could not have been the intention of the legislature nor is it consistent with the dictum in the *Mersing Omnibus* case to achieve certainty. On the other hand I am of the view that by treating the time of the reference as being the date on which notification is issued (as opposed to the date of communication), the certainty intended would be achieved. Further there will be injustice caused to a litigant who discovers that some months before a decision affecting his interest had been made but the letter notifying him of it was issued late and he is unable to challenge the said decision.

In conclusion I am of the view that the act of reference by the Minister under s. 20(3) occurs when the notification is issued (as opposed to the date he records his decision on an internal document) to the Industrial Court. The Minister's decision on whether to refer the representation is a process and it is at the conclusion of this process that *certiorari* may lie against his decision. For the reasons stated earlier, manifest injustice and uncertainty will result if the decision is taken to have been made prior to the notification being issued to the Industrial Court. In the circumstances, the preliminary object raised by the respondent is dismissed with cost. The application by the applicant is allowed with cost. As to lampiran (8) order in terms of (1) is hereby granted.